No. 22,753 and 22,811

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner

v.

THE DEUTSCH COMPANY, ELECTRONIC COMPONENTS DIVISION, Respondent

---

On Petition To Review and Cross-Petition for Enforcement of an Order of the National Labor Relations Board

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PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

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PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

The National Labor Relations Board respectfully petitions the Court to grant rehearing, and suggests rehearing in banc, of the decision entered in this case on April 8, 1969. In that decision a panel of the Court (Circuit Judges Chambers and Koelsch, and District Judge Von Der Heydt) held that the violations found by the Board were too "trivial" to warrant enforcement of the Board's remedial order. We submit that such discounting of the unfair labor practices found here is unjustified, and that the Court's refusal to enforce the Board order exceeds the established limits

of judicial review of Board orders and is inconsistent with decisions of this and other courts of appeals.

1. It is an unfair labor practice for an employer to prohibit his employees from soliciting union membership or distributing union literature on their free time and in nonwork areas, unless "special circumstances make the rule necessary in order to maintain production or discipline." *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793, 803, n. 10 (1945), quoting from *Peyton Packing Co.*, 49 NLRB 828, 843-844, enforced 142 F.2d 1009, 1010 (C.A. 5, 1945), cert. denied, 323 U.S. 730.[1] Beyond dispute, the Company maintains and enforces a rule forbidding employees from soliciting for a union or passing out union literature on Company property (except in one parking lot) *at any time.* Thus, since 1962 a rule in the Company's orientation booklet has prohibited "the solicitation of membership in organizations during working hours on Company property" (R. 21; Exh. 2). After the Union's current organizing campaign began, several employees received written warnings when, prior to the commencement of work, they attempted to pass out union authorization cards while standing just inside a plant gate.[2] About the same time, two employees who distributed authorization cards in the plant lunchroom during their respective lunch periods received three-day disciplinary layoffs (R. 29; Tr. 79-83, 119-121, 205-208, 225-226, 250-252). The Board found that the

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[1] Accord: *N.L.R.B. v. Essex Wire Corp.*, 245 F.2d 589, 593 (C.A. 9, 1957); *Republic Aluminum Co. v. N.L.R.B.*, 394 F.2d 405 (C.A. 5, 1968) (*in banc*); *Campbell Soup Co. v. N.L.R.B.*, 380 F.2d 372, 373 (C.A. 5, 1967); *N.L.R.B. v. United Aircraft Corp.*, 324 F.2d 128, 130-131 (C.A. 2, 1963), cert. den., 376 U.S. 951.

[2] The warning stated: "It is forbidden to hand out Union literature within the Deutsch plant during working hours *or rest periods*" (emphasis supplied), and threatened the employees with discharge for "continued infractions" of the rule. A similar notice was posted on the plant bulletin board (R. 29; Tr. 82-84, 117-118).

Company had failed to show a legitimate reason for its total ban on union activity in the plant (R. 13-14).[3] The Board therefore concluded that the Company's no-solicitation and no-distribution rules violated Section 8(a)(1) of the Act and that the disciplinary suspension given two employees violated Section 8(a)(3).[4] The Board issued a conventional order directing the Company to cease and desist from the violations found, including "maintaining and enforcing an unlawful broad rule prohibiting solicitation and distribution of literature on behalf of the Union during nonworking time in nonworking areas of the plant" (R. 32).

2. We submit that on no permissible scale of evaluation can the violations herein be deemed too minimal to warrant relief.[5] This is not a case of an isolated and completed act of misconduct. The Company's rule, actively enforced, is a continuing bar against employees engaging in union activity in lunch rooms, rest areas, and elsewhere in the plant on their own time. The cease and desist order is not only appropriate but essential to effectuate the statutory policy to protect union activity at the employees' place of work, consistent with the employer's reasonable needs.

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[3]According to the Company, the distribution of Union literature in the vicinity of the plant gates might cause congestion and hinder the checking of badges by guards. The Board noted, however, that traffic at the gates never exceeded ten employees a minute and that this reason was never mentioned to the employees. The Board also rejected the Company's explanation for banning the distribution of authorization cards in its lunchrooms—that its guards might see the cards in the employees' lunch boxes during a gate check—noting that such inadvertent discovery of union material "would not be considered an unfair labor practice" (R. 29).

[4]The Board also found that the Company violated Section 8(a)(1) by giving its employees improper assistance in the revocation of executed authorization cards (R. 29-31).

[5]The Company has never contended that, if its conduct was violative of the Act, it was too trivial to justify the Board's remedial order.

3. By refusing to enforce this order, the panel has patently overstepped the bounds of the reviewing authority conferred by the Act. As the Supreme Court has repeatedly admonished, "the relation of remedy to policy is peculiarly a matter for administrative competence [and] courts must not enter the allowable area of the Board's discretion." *Phelps-Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 194 (1941).[6] It is for the Board, once it has found that unfair labor practices have been committed, to determine whether effectuation of the statutory policies requires the issuance of a remedial order barring such practices.[7] Indeed, at least two circuits have held that the Act *requires* the Board to issue a cease and desist order once it has determined that a person has committed unfair labor practices.[8] But, whatever the allowable limits of the Board's discretion in this area, once it determines a remedy is necessary and orders "an appropriate remedy, a like obedience to the statutory law on the part of the Court of Appeals requires the court to grant enforcement of the Board's order" where, as here, the Board's unfair labor practice findings are clearly supported by the record. *N.L.R.B. v. Bradford Dyeing Ass'n*, 310 U.S. 318, 343 (1940).[9] The Court's scope of review is even "more

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[6]Accord: *N.L.R.B. v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 271 (1938); *I.A.M. v. N.L.R.B.*, 311 U.S. 72, 82 (1940); *N.L.R.B. v. Falk Corp.*, 308 U.S. 453, 461 (1940); *Franks Bros. v. N.L.R.B.*, 321 U.S. 702, 704 (1944); *Int'l Ladies Garment Workers' Union v. N.L.R.B.*, 366 U.S. 731, 735, 736, 739-740 (1961); *Fibreboard Corp. v. N.L.R.B.*, 379 U.S. 203, 216 (1963).

[7]See e.g., *Atlas Storage Division, P & V Atlas Industrial Center, Inc.*, 112 NLRB 1175, 1180 (1955), enforced *sub nom., Chauffeurs, Teamsters, etc., Local 200 v. N.L.R.B.*, 233 F.2d 233 (C.A. 7, 1956) (no order necessary to remedy an isolated threat against one employee in a large unit).

[8]*Int'l Woodworkers of America, Local 3-10 v. N.L.R.B.*, 380 F.2d 628, 630-631 (C.A. D.C., 1967); *Eichleay Corp. v. N.L.R.B.*, 206 F.2d 799, 805 (C.A. 3, 1953).

[9]Accord: *N.L.R.B. v. Int'l Union, Progressive Mine Workers*, 375 U.S. 396 (1964), summarily reversing 319 F.2d 428 (C.A. 7); see *N.L.R.B. v. Warren Co., Inc.*,

limited" with respect to a "simple cease and desist order," for "whatever may be the broader policies of the Act, the compelling policy which we may not thwart is the Congressional determination that certain acts are illegal and must be enjoined." *Eichleay Corp. v. N.L.R.B., supra,* 206 F.2d at 805.

4. The panel's decision is also contrary to this Court's decision in *N.L.R.B. v. Essex Wire Corp., supra,* 245 F.2d 589. There, as here, the employer maintained an unlawful broad no-solicitation rule which prohibited, *inter alia,* union solicitation during employees' rest periods.[10] Unlike the case at bar, the Essex employer expressly contended that the incidents charged against it, even if unlawful, were "isolated and sporadic," so that "issuance of a cease and desist order [was] nevertheless unwarranted", *supra,* at 593. Rejecting this contention, the Court observed that "the incidents, while few in number, involved more than isolated and chance remarks, interrogations, or warnings later repudiated and never enforced" (*supra,* at 594). The Court acknowledged that "the Company's basic policy with respect to such union activity" may have been "fair and proper" but held that "the criticized practices were of a nature which warranted the Board in characterizing them as unlawful and in ordering that respondent cease and desist" (*ibid.*).

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350 U.S. 107, 112 ("where the Board has acted properly within its designated sphere, the Court is required to grant enforcement of the Board's order"); see also, *N.L.R.B. v. Mexia Textile Mills, Inc.,* 339 U.S. 563, 567-568 (1950); cf. *N.L.R.B. v. Ochoa Fertilizer Corp.,* 368 U.S. 318, 322 (1961).

[10]The Board found as separate 8(a)(1) violations incidents wherein supervisors ordered one employee to surrender signed authorization cards in his possession (*supra,* at 592), and ordered another to remove her union button (*supra,* at 591, 593).

CONCLUSION

For these reasons, the case should be reheard, either by the panel, or in banc, and, after such rehearing, a decree should be entered enforcing the Board's order.

Respectfully submitted,

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